STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HENDERSON RATCLIFFE,

Defendant-Appellant.

UNPUBLISHED
March 16, 1999

No. 203720
Missaukee Circuit Court
LC No. 96-101213 FC

Before: Holbrook, Jr., P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant James Henderson Ratcliffe, Jr., appeals as of right from a judgment of sentence imposed after a jury convicted him of one count of first-degree criminal sexual conduct ("CSC I") pursuant to MCL 750.520b(1)(b); MSA 28.788(2)(1)(b) and two counts of third-degree criminal sexual conduct (CSC III) on a theory of aiding and abetting in violation of MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The lower court sentenced defendant to concurrent terms of fifteen to thirty years in prison for the CSC I conviction, and six to fifteen years in prison for each CSC III conviction. We affirm.

On appeal, defendant challenges the trial court's decision to assign ten points under offense variable (OV) 9 while scoring the CSC I offense under the sentencing guidelines. A defendant presents a cognizable claim on appeal with respect to a guidelines' scoring decision only when, "(1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Raby*, 456 Mich 487, 497-498; 572 NW2d 644 (1998), quoting *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). Additionally, "a given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990).

In this case, defendant challenge's the trial court's decision to score OV 9, which permits the sentencing court to assign ten points if a defendant was a "[l]eader in a multiple offender situation" or

zero points if a defendant was "[n]ot a leader" in the offense. Michigan Sentencing Guidelines (2d ed) at 45. The attendant instructions say that the court must consider "[t]he entire criminal episode or situation . . . in determining whether an offender is a leader." *Id*. The lower court found that defendant was a leader within the meaning of the offense variable because he was an adult involved in the situation, as well as the head of the household. In response to defendant's argument that the situation was really one of multiple victims rather than multiple offenders, the lower court found that the teenagers committed CSC III on each other and, therefore, were offenders as well as victims. We agree. MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) provides that it is unlawful for a person to engage "in sexual penetration with another person" between thirteen and sixteen years of age, and proscribes both penetrating another and being penetrated. See also MCL 750.520a(l); MSA 28.788(1)(l) (defining sexual penetration as including fellatio); see, generally, *People v Engelman*, 434 Mich 204; 453 NW2d 656 (1990); *People v Ellis*, 174 Mich App 139; 436 NW2d 383 (1988). Consequently, the teenagers' trial testimony that they were each within the protected age range and that the girl performed oral sex on the boy supports the lower court's conclusion that they were both offenders, and that defendant was therefore involved in a multiple offender situation.

The record also supports defendant's status as a leader in this multiple offender crime. See *People v Wilson*, 196 Mich App 604, 609, 612; 493 NW2d 471 (1992). Not only did defendant exercise a position of authority as an adult and parent among the participants in the offense, but defendant's son provided testimony that on the night in question defendant took specific steps to direct the sexual activity. See *People v Hack*, 219 Mich App 299, 313-314; 556 NW2d 187 (1996). We are convinced that the combination of defendant's conduct and his authority made him a leader in this context and that the trial court did not err in scoring ten points for his leadership under OV 9. See *People v Johnson*, 202 Mich App 281, 289-290; 508 NW2d 509 (1993). Consequently, we do not believe that defendant has shown that the trial court erred by relying on a factual predicate that was wholly unsupported or materially untrue. *Raby*, *supra*.

Defendant's argument on appeal also implicates OV 6, for which the lower court assessed ten points. However, we decline to address this issue because defendant did not object to the score for this variable in the court below and, therefore, did not preserve it for our review. MCR 6.429(C).

Defendant also challenges the proportionality of his fifteen- to thirty-year sentence, although he does so chiefly in the context of the three-part test enunciated in *Raby*, *supra* at 496-497. The sentence imposed by the lower court met, but did not exceed, the highest end of the range recommended by the guidelines and, therefore, is presumptively proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). The sentence also falls within the middle of a continuum of sentences possible for CSC I convictions, which supports our conclusion that this sentence is proportionate to defendant's offense, which was both serious and emotionally damaging to his victims, and the offender. See *Milbourn*, *supra* at 653-654.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Michael J. Talbot